AUG 10 1970

In the

Supreme Court of the United States

OCTOBER TERM, 1970

No. .....

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Petitioner,

v.

DON NIVENS
Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JACK W. FLOCK,
Box 629,
Tyler, Texas 75701
Attorney for Petitioner.

Of Counsel:
CLYDE W. FIDDES
MIKE A. HATCHELL
RAMEY, BRELSFORD, FLOCK,
DEVEREUX & HUTCHINS.

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To the Honorable Supreme Court of the United States:

Comes now the St. Louis Southwestern Railway Co., as petitioner, and prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered April 16, 1970.

in the above styled railroad injury suit brought pursuant to the provisions of *45 U.S.C.*, § *51*, et. seq. As grounds for granting its petition, petitioner would show the Court as follows:

THE OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is now officially reported in 425 F. 2d 114 and is printed in full as Appendix A hereto, infra, pages A1-12. There was no opinion or memorandum filed by the district court in which the case was tried.

JURISDICTION OF THE COURT

The judgment of the Court of Appeals, reproduced as Appendix B hereto, infra, page B-1, was rendered and entered on April 16, 1970.

The petition for rehearing below, timely filed,* was denied by order dated May 20, 1970. That order is reproduced as Appendix C, infra, page C-1.

The jurisdiction of this Court is invoked under *28 U.S.C.*, § *1254 (1)*.

THE QUESTIONS PRESENTED FOR REVIEW

(1) Whether the trial court's charge erred in stating the measure of petitioner's liability under *45 U.S.C.*,

* The time for filing the appellant's petition for rehearing was extended by the Court of Appeals to and including May 11, 1970.

§ *51*, by imputing to petitioner the prior negligence of the Southern Pacific Company in the "design" of the roadbed where occurred the accident giving rise to suit, the particular charge imputing such prior negligence being as follows:

> "In this case the area of trackage involved belonged to the Southern Pacific Company, but it was being used by the Defendant for its benefit and in furtherance of its operational activities. Under these circumstances, the Defendant is fully responsible under the provisions of the Federal Employer's Liability Act for any conduct on the part of the Southern Pacific Company or any of its agents or employees in the maintenance or design of the roadbed in question if such conduct amounted to negligence, and played a part in the derailment in question. In short, the negligence of the Southern Pacific Company or its employees is to be considered the negligence of the Defendant with respect to the design and maintenance of the trackage in question." (R. 1055.) *

(2) Whether, on the facts of the case, the above quoted charge, by imputing to petitioner the prior negligence of the Southern Pacific Company in the "design" of the roadbed, changed the standard of liability under *45 U.S.C.*, § *51*, from that of the defendant-carrier's own negligence (i.e. "* * * its negligence * * *") to that of strict or absolute liability.

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* All "R" references are to the "Appendix" filed in the court below and now certified as the record in this cause by the clerk of that court pursuant to the authority of *Rule 21 (2), Rules of the Supreme Court of the United States.*

THE STATUTE INVOLVED

The sole federal statutory provision involved is *45 U.S.C., § 51*, which reads as follows (the portions pertinent here being underscored):

> "§ 51. *Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.*
>
> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of

this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404."

STATEMENT OF THE CASE

A. *The Trial Court Proceedings.*

Respondent brought this suit under the "negligence" provisions of the Federal Employers Liability Act, *45 U.S.C., § 51, et seq.*, to recover damages for personal injuries sustained when, during the course and scope of his employment for petitioner, the train upon which he was working as brakeman, was derailed by a "washout" in and under the roadbed: (R. 9-11, 48-49, 54-55.)

In the original petition, negligence was predicated upon petitioner's failure to furnish a safe place to work, failure to make proper inspection of the tracks, and failure to properly maintain the premises upon which respondent was required to work. (R. 10.) In the Final Pre-Trial Order, the contested issues of fact were listed as (1) whether or not petitioner was negligent in the design and maintenance of the tracks and roadbed, or (2) whether or not petitioner was negligent in permitting its train to "run" under the existing circumstances. (R. 51.)

The case was tried to a jury (R. 132-133) on a general charge (R. 1049-1063), a portion of which (previously quoted in full at page 3, supra) made petitioner "fully responsible" for any prior negligence of the Southern Pacific Company in the "design of the roadbed in question" (R. 1055) and further charged that Southern

Pacific's negligence in regard to the "design" of the trackage in question was to be "considered" the negligence of the petitioner. (R. 1055.)

Before the charge was read to the jury (R. 925), petitioner objected to the imputation of Southern Pacific's negligence in regard to the "design" of the roadbed, pointing out that the "design" of the roadbed "* * * had been established * * *" before petitioner began use of the track. (R. 932.) The trial court stated that the objection was understood (R. 932) but that it would be overruled. (R. 933.)

Subsequently, the jury returned a verdict favorable to respondent with damages assessed in the amount of $112,000.00. (R. 1068.) Thereafter, judgment was entered against petitioner for that amount, less a certain amount due the Railroad Retirement Board, or for $109,040.80. (R. 76-77.)

B. *The Facts Pertinent to the Issues Presented.*

The train which ran aground, and upon which respondent was working, was petitioner's Plano-Sherman local, which consolidated and delivered freight from Sherman, Texas, to connecting trains out of Plano, Texas. (R. 164.)

On the evening of September 20, 1964, with respondent aboard as brakeman (R. 160), the train made up, as usual, about 7:30 p.m. in Sherman and proceeded to Plano, arriving there about 9:00 p.m. (R. 166-167.)

After completing its work in Plano, the crew left for Sherman at 1:57 a.m. (R. 652.) At that time, there was a "moderate" rain (R. 224-226) falling at the Plano depot, but there is ample evidence that rainfall just north of Plano was severe, if not completely unprecedented, possibly as much as four inches per hour. (See R. 338-340, 362, 668, 702, 707-713, 790, 823, 845, 909.)

As the train cleared the yard at Plano and approached Mile Post 284.30 (hereafter MP 284.30) about two miles north of the depot (R. 226, 720, 778, 818), the train ran into a depression, dropped down, and stopped. (R. 171, 227.) The engine itself did not turn over (R. 227), but the rest of the train substantially derailed. (R. 172.)

Subsequently, it was learned that, due to the heavy rain just described, the roadbed and culvert at MP 284.30 had washed out from under the track for about 250 feet and 15 feet deep (R. 818), leaving the rails without any support.

As the Final Pre-Trial Order indicates (R. 51), the principal (if not the only) negligence dispute in this case centered around whether or not the "design" of the drainage structure at MP 284.30 was sufficient to permit the proper drainage of high water. This is borne out by the fact that practically all of respondent's evidence related to the sufficiency of the drainage structure at MP 284.30.

In that regard, it is significant to note that petitioner did not "design" the drainage structure where the washout occurred. The portion of track in question was both owned and maintained by the Southern Pacific Company. (R. 27, 54.) The culvert or drainage structure at MP 284.30 had been in existence since the early 1900's. The original drainage structure at that point was a simple 6′ x 6′ brick arch which was designed and built sometime before 1914. (R. 334, 353, 734-735, 740.) This structure, as designed, remained unchanged and served Southern Pacific (or its predecessors) reasonably well until the early 1940's. In 1942, 1945, and 1947, washouts under the track were experienced. (R. 312-313, 326, 334, 353, 743.) As a result of this, certain changes in the drainage structure at MP 284.30 were undertaken by Southern Pacific. It was decided that replacing the original brick arch with two iron pipes would "* * * 'provide adequate waterway and prevent further washouts.'" (R. 354.) This was accomplished in early 1948 by the installation of one 72″ by 64′ corrugated iron pipe in the arch itself and the placement of a like 84″ by 64′ pipe some 30 feet to the south with an overlay of dirt fill. (R. 359, 372, 723-724, 742, 743, 748.)

It was not until seven years and nine months after this last and final "design" change in the structure at MP 284.30 that petitioner began use of the track in

question. It acquired that right by a lease dated September 26, 1953.* There is no evidence that petitioner itself changed the design of the drainage structure at MP 284.30 after it acquired the right to use the track and up to the date of the accident. The design in effect when the accident occurred was the design implemented by the Southern Pacific Company or its predecessors prior to petitioner's lease of the trackage.

The above facts essentially are undisputed. From them, the principal points to be noted are (1) that petitioner's conduct played no part in the "design" of the roadbed and drainage structure in question, said "design", if insufficient, being accomplished wholly by the negligence of Southern Pacific (or its predecessors) *before* petitioner acquired any proprietary interest in the tracks, and (2) that the "design" was not modified during petitioner's lease of the tracks so as to make any such modification an "operational activity" for petitioner's benefit.

C. *The Decision of the Court of Appeals.*

After discussing extensively the liability of the defendant-carrier under *45 U.S.C., § 51*, the Court of Appeals held that the charge imputing negligent "design"

* This lease was erroneously omitted by the printer from the Appendix, but is a part of the formal record. It was admitted into evidence at R. 958 and is part of the record before this Court via certified supplement of the clerk of the Court of Appeals. Actually, the lease shows Texas & New Orleans Railroad Company as the owner of the track, but Southern Pacific was treated as the owner for purposes of this suit. (R. 27, 54.)

was "unnecessary", but, even if erroneous, was not harmful because "* * * the evidence overwhelmingly proves that the railroad was negligent in providing a safe place to work, and that element was charged.* * *" (425 F. 2d 120.) Thus, it affirmed the judgment on the basis of evidence which would support other, properly submitted, bases of liability separate and apart from the imputed negligence in "design".

REASONS FOR GRANTING THE WRIT

I.

The imputation to petitioner of Southern Pacific's negligent "design", under the facts of the case, changed the standard of petitioner's liability under 45 U.S.C., § 51, from that of "negligence" to that of strict liability for injury.

This petition should—indeed must!—be granted if "negligence" is still the test of liability under *45 U.S.C., § 51*, because the trial court's imputation to petitioner of Southern Pacific's negligent "design" of the roadbed has fixed petitioner's liability according to a standard—absolute liability without fault—which is foreign to § 51. The Court of Appeals' affirmance of liability on such charge puts within this Court's jurisdiction to review a radical departure from, or alteration of, the § 51 liability specified by Congress, to-wit:

It is firmly entrenched by decisions of this Court that, because § 51 uses the terms "negligence" and "its

negligence" in explanation of the phrase "liable in damages", the *only* standard of liability permitted by § 51 is traditional "negligence"; that there is no cause of action under § 51 without proof of "negligence". *Chesapeake & Ohio R. Co. v. Stapleton, 49 S. Ct. 442, 279 U. S. 587, 590, 73 L. Ed. 861, 864 (1928); Toledo, St. Louis & Western R. Co. v. Allen, 48 S. Ct. 215, 276 U. S. 165, 168-169, 72 L. Ed. 513, 515 (1928).* The Court has been equally firm in holding that the Act does not make the railroad an insurer or guarantor of employees' safety separate and apart from its own conduct or fault. *Missouri Pacific R. Co. v. Aeby, 48 S. Ct. 177, 275 U. S. 426, 429-430, 72 L. Ed. 351, 354 (1928); Inman v. Baltimore & Ohio R. Co., 80 S. Ct. 242, 361 U. S. 138, 140, 4 L. Ed. 2d 198, 201 (1959).* Naturally, the same rule applies to the specific duty, here involved, to provide a safe place to work; that duty, under § 51, is not absolute, but requires only that reasonable care be exercised to provide such safe place. *Baltimore & Ohio Southwestern R. Co. v. Carroll, 50 S. Ct. 182, 280 U. S. 491, 496, 74 L. Ed. 566, 575 (1930).*

The phraseology of § 51, coupled with the traditional concept of "negligence", dictate that § 51 liability depends upon certain prerequisite factual elements—all of which were precluded by the charge complained of here.

First of all, since the word "it" modifies "negligence", insofar as liability for "roadbed" defects and insufficiencies are concerned, the statute clearly contemplates that

the conduct alleged to be negligent be the conduct of the defending railroad itself, i.e. it must be "* * * negligence *on the part of* the carrier." *Missouri Pacific R. Co. v. Aeby, supra, 48 S. Ct. 177, 275 U. S. 426, 429, 72 L. Ed. 351, 354 (1928), emphasis added; Seaboard Airline Railway Co. v. Horton, 34 S. Ct. 635, 233 U. S. 492, 502, 58 L. Ed. 1062, 1069 (1914); Ritson v. New York, Chicago & St. Louis R. Co., 336 Ill. App. 356, 83 N.E. 2d 617 (1949).* But here, by charging that Southern Pacific's prior negligence in the "design" of the roadbed was to be "considered" as petitioner's negligence, the trial court permitted the fixation of § 51 liability against petitioner by virtue of *another's conduct*, not the statutorily required conduct of the defendant-railroad itself. In this regard, too, it will be remembered that the "design" of the roadbed had been accomplished *before* petitioner gained any proprietary interest in its use so that, when Southern Pacific implemented the design of the roadbed, it could not possibly have been acting as petitioner's agent, nor could it have been performing any "operational activities" for petitioner so as to bring into play the doctrine of *Sinkler v. Missouri Pacific R. Co., 78 S. Ct. 758, 356 U. S. 326, 331-332, 2 L. Ed. 2d 799, 804 (1958).*

Second, the traditional concept of "negligence", as used in § 51, contemplates (insofar as roadbed defects and insufficiencies are concerned) that the tortfeasor (1) have opportunity to discover the defect or insufficiency, (2) that it have opportunity to correct or eliminate the

same, and/or (3) that it have the opportunity to warn against the danger. Or, as the court aptly put it in *Raudenbush v. Baltimore & Ohio R. Co., 160 F. 2d 363, 367 (3rd Cir. 1946)*, "* * * (t)he degree of care to be exercised . . . must have some reasonable relationship to the ability of that party upon whom the duty is cast to perform such duty. * * *" See also *Miller v. Cincinnati, New Orleans & Texas Pacific R. Co., 317 F. 2d 693, 695 (6th Cir. 1963)*. It also contemplates that the harm be foreseeable. *Gallick v. Baltimore & Ohio R. Co., 83 S. Ct. 659, 372 U. S. 108, 117, 9 L. Ed. 2d 618, 626, (1963)*.

Keeping in mind that Southern Pacific's "design" of the roadbed was complete before petitioner leased it or used it, the charge's imputation of Southern Pacific's prior negligence in such "design" precluded any opportunity for the exercise of care or foresight by petitioner, though such opportunity is fundamentally a part of § 51's negligence concept. In other words, by making petitioner "fully responsible" (R. 1055) for negligence in "design" that had occurred prior to its lease of the tracks, the charge essentially instructed that petitioner had been guilty of negligence from the very moment it had acquired any right to use the roadbed in question, thus denying petitioner any opportunity, *through its own conduct*, to discover, to repair or eliminate, or to

warn against any defective "design", nor did the charge invoke the element of foreseeability on petitioner's part. By making Southern Pacific's prior negligence the negligence of petitioner, the charge precluded the jury from evaluating the reasonableness of petitioner's own conduct thereby denying the railroad the right or opportunity to protect itself from F.E.L.A. liability by the exercise of ordinary care on its part. Yet, it is the carrier's own conduct ("* * * its negligence * * *") about which § 51 is concerned. To fix liability under § 51, as the "design" charge did here, without regard to the quality or character of conduct on the part of the carrier sued, is to impose absolute liability in its purest form. By so doing, the charge in this case was in error.

The Court of Appeals' affirmance of liability based on such erroneous charge is contrary to several F.E.L.A. cases, such as: *Elkins v. Wheeling & Lake Erie Ry. Co., 113 N.E. 2d 233 (Ohio Sup. 1953)*, where the charge erroneously imputed to the defendant-railroad the negligence of a third party biscuit company (on whose property the plaintiff was injured) in the "construction" of a certain conveyor system prior to defendant's use of the premises, the court noting that the defendant did not stand in the place of the biscuit company, but could be liable only for its failure to inspect or warn

against the defective conveyor;* *Rupert v. Chicago, M., St. P. & P. R. Co., 232 N.W. 551, 552 (Wisc. Sup. 1930)*, where the court noted that § 51 did not make the railroad responsible for the manufacturer's negligence in the "*design* or original construction" of a "hangar" on a foreign car transferred to defendant's service; that the railroad was liable only for its own negligence in failing to inspect the foreign car and discover any defect in the hangar. To the same effect, see: *Lowden v. Harson, 134 F. 2d 348 (8th Cir. 1943)* and *Brewer's Administratrix v. Louisville & Nashville R. Co., 34 S.W. 2d 949 (Ken. App. 1931)*.

Petitioner agrees with the Court of Appeals that Southern Pacific's negligent "design" does not "absolve"

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* That portion of the court's holding in *Elkins* which is pertinent to the erroneous charge in this case is as follows:

> "In the course of the charge the court further instructed the jury as follows:
>
> '* * * ordinary care in this case would be such care as those persons who are engaged in the business of operating conveyer systems for this or similar purposes are accustomed to exercise in the use and operation of such machinery. Defective machinery is the gist or basis of this charge.'
>
> "This portion of the charge is entirely foreign to the issues which the court submitted to the jury and should not have been given. Negligence on the part of the biscuit company in the operation of its conveyer system was not an issue. Only the presence of the chutes of the system in their then condition and their mode of operation at the point where cars of the defendant were loaded, as related to the question of whether the defendant furnished plaintiff a reasonably safe place to work, were for the consideration of the jury. The instruction of the court could well have led the jury to infer that the defendant stood in the position of the biscuit company and that it was directly liable for any negligence in the construction or operation of the conveyer system. The primary issue was, did the defendant provide plaintiff a reasonably safe place of employment, and the court erred in saying, 'defective machinery' is the gist or basis of this charge.' (113 N.E. 2d 239-240)

it of liability under the Act. (See infra, p. C-6.) What it says is that negligence regarding said "design" must be its own, for example, in failing to inspect the roadbed, in failing to warn against the defective "design" or in permitting its employees to use the roadbed despite an insufficient "design". Those acts or omissions would be "its" negligence as contemplated by § 51, and, as this Court has noted, it is such acts (not the imputed, prior negligence of the third party) which determine the railroad's § 51 liability for defects and insufficiencies in a third party's property. See *Shenker v. Baltimore & Ohio R. Co.*, 83 S. Ct. 1667, 374 U. S. 1, 9-10, 10 L. Ed. 2d 709, 715-176 (1963); *Baltimore & Potomac R. Co. v. Mackey*, 15 S. Ct. 491, 157 U. S. 72, 91, 39 L. Ed. 624, 631 (1895). Also see *Colorado & Southern Ry. Co. v. Rowe*, 238 S.W. 908, 912 (Tex. Comm. App. 1922) and *Apache Ry. Co. v. Shumway*, 158 P. 2d 142, 150 (Ariz. Sup. 1945).

By erroneously imputing to petitioner prior negligence which was not "its" conduct regarding a "design" as to the implementation of which it had no opportunity to exercise care or control to protect itself or to prevent injury, the trial court's charge erroneously stated petitioner's liability under § 51. *Seaboard Airline Railway Co. v. Horton, supra, 34 S. Ct. 635, 233 U. S. 492, 500-502, 58 L. Ed. 1063, 1068-1069 (1914).*

II.

Since the case was submitted on a general charge, the erroneous instruction on negligent "design", as one basis of liability, was not cured or rendered harmless by evidence to support other bases of liability which were properly submitted.

In holding that the instruction regarding "design" was "unnecessary" (425 F. 2d 120), it is not clear whether or not the Court of Appeals held that it was also erroneous. It *is* clear that, to avoid the issue, the court held that, even if erroneous, the imputation of Southern Pacific's negligence in "design" was harmless as there was evidence of petitioner's own negligence in failing to provide a safe place to work, which ground of liability was properly submitted. (425 F. 2d 120.)

That holding is erroneous on its face. The charge here was a general one. One basis of liability submitted by the charge, and upon which the jury could have rested its verdict, was erroneous. It is an established canon of procedure that a verdict cannot stand upon a general charge which contains one basis of liability erroneously stated or unsupported by evidence. That is elementary! *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 82 S. Ct. 1130, 370 U. S. 19, 29-30, 8 L. Ed. 2d 305, 312 (1962); Markley v. Baldwin, 5 S. Ct. 278, 112 U. S. 490, 493, 28 L. Ed. 822, 823 (1884).*

Since so much of the evidence concerned the sufficiency of the drainage structure's "design" at MP

284.30, Southern Pacific's erroneously imputed negligence in that regard cannot be viewed as *de minimis* in the jury's deliberations.

III.

The fact that the Southern Pacific Company owns 96% of petitioner's stock does not change the measure of its liability under 45 U.S.C., § 51.

Running through the Court of Appeals' opinion is sporadic reference to the fact that 96% of petitioner's stock is owned by the Southern Pacific Company.* Though its holding did not turn upon that fact, the lower court seems to have been much influenced by it.

The original petition and the pre-trial order did not raise any issue as to alter ego. There is no evidence that Southern Pacific so dominated the management of petitioner that both should be treated as the same entity. Accordingly, both corporations were entitled and required to be treated as separate entities for F.E.L.A. purposes, and Southern Pacific's ownership of any, or

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* Note these comments by the Court of Appeals:

"* * * the court charged that the railroad would be responsible because the track was being used by the appellant 'for its benefit and in furtherance of its operational activities' (also no doubt reflecting the stipulation that the appellant railroad was 96% owned by Southern Pacific). * * *" (425 F. 2d 117.)

* * * * *

"The significance of the foregoing to this case is that even if Southern Pacific were to be considered an aloof third party, its negligence in designing the track roadbed prior to leasing it to the railroad, . . . , may not absolve the railroad for its separate and distinct statutory duty to provide its employees with a safe place to work. * * *" (425 F. 2d 119.)

all, of petitioner's stock is no basis for altering petitioner's § 51 liability. *Garrett v. Southern Railway Co.*, *278 F. 2d 424, 425 (6th Cir. 1960), cert. den. 81 S. Ct. 49, 364 U. S. 833, 5 L. Ed. 2d 59.* Also see *Overstreet v. Southern Railway Co. 371 F. 2d 411, 412 (5th Cir. 1967) cert. den. 387 U. S. 912.*

CONCLUSION

For the foregoing reasons, it is prayed that this petition for writ of certiorari be granted and that, upon final hearing, the judgments of the courts below be reversed.

Respectfully submitted,

Jack W. Flock

JACK W. FLOCK
Counsel for Petitioner

Of Counsel:
CLYDE W. FIDDES
MIKE A. HATCHELL
RAMEY, BRELSFORD, FLOCK, DEVEREUX AND HUTCHINS

APPENDIX

A. The Opinion of the Court of Appeals.

B. The Judgment of the Court of Appeals.

C. The Order of the Court of Appeals on Petition for Rehearing.

APPENDIX A

In the

UNITED STATES COURT OF APPEALS

For The Fifth Circuit

No. 28251

DON NIVENS,

Plaintiff-Appellee,

versus

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Texas

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(April 16, 1970)

Before WISDOM, GOLDBERG and INGRAHAM, Circuit Judges.

INGRAHAM, Circuit Judge: The St. Louis Southwestern Railway Co. (the railroad) appeals from a jury verdict holding it liable under §1 of the Federal

Employer's Liability Act[1] (the Act) for injuries incurred by one of its brakemen, the appellee (Nivens) in a train derailment. The accident occurred when the appellant's train ran aground in a drainage culvert which had washed out in a rainstorm.

Nivens' suit sought alternative bases for finding the railroad liable (1) that the railroad was negligent in permitting its employees to work in an unsafe place, i.e., upon a defectively designed roadbed, and (2) that the railroad was negligent in permitting its train to run in light of dangerous weather conditions. The railroad defended on the grounds that (1) it did not own the track, the track being under lease from Southern Pacific, and that it was not liable for a design, even if found to be defective, prior to the lease, and that (2) the torrential rainstorm was an unforeseeable act of God.

A general verdict was returned finding the railroad negligent and awarding Nivens damages in the amount of $109,040.80.

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[1] This FELA suit is grounded solely upon the negligence provisions of §1 of the Act, 45 U.S.C. §51, which provides in pertinent part that a common carrier by railroad shall be liable for

> "injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed . . . or other equipment."

Damages awarded Nivens for injuries to his back are not in issue. Nor is it disputed that the appellee was an employee of the railroad and was engaged in work for the railroad at the time of the accident. With the exception of the roadbed, the condition of the railroad's equipment is similarly not in issue.

I

The railroad first contends that the trial judge erred in charging the jury that it was responsible under the Act for the conduct of Southern Pacific in the "maintenance or design" of the roadbed, if that conduct were found negligent. The court charged that the railroad would be responsible because the track was being used by the appellant "for its benefit and in furtherance of its operational activities" (also no doubt reflecting the stipulation that the appellant railroad was 96% owned by Southern Pacific[*]). The railroad maintains that if the design of the roadbed was negligent, the negligence was complete seven and one-half years before it leased the roadbed. It could not have had an opportunity to exercise due care in regard to the track at the time the design was formulated, thus it could not have known that the faulty design created an unsafe place to work.

The railroad characterizes the nature of its responsibility, and thus the nature of this suit, erroneously.

The standards of liability for negligence under §1 of the Act are significantly broader than in ordinary common-law negligence actions. The Supreme Court has succinctly stated the now settled principles that in these cases,

> "the test of a jury case is simply whether the proofs justify with reason the conclusion that

[*]Southern Pacific is stipulated to be the owner of the track in question for purposes of this suit, although the lease of the track to the appellant shows Texas & New Orleans R.R. to be the owner.

> employer negligence played any part, even the slightest, in producing the injury . . . . It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the results to other causes . . . . The employer is stripped of his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit" Rogers v. Missouri Pac. Ry., 352 U.S. 500, 506-08 (1957).

Since the Act explicitly makes an employer liable if an injury results only in part from his negligence, the common-law proximate cause standard is modified, and the employee has a less demanding burden of proving casual relationship. *Hausrath v. New York Cent. R.R.*, 401 F.2d 634 (6th Cir. 1968); cf. *Lindauer v. New York Cent. R.R.*, 408 F.2d 638 (2nd Cir. 1969). Moreover, the defense of assumption of risk is eliminated under §4 of the Act, 45 U.S.C. sec. 54, and the employee's contributory negligence does not bar recovery if the employer's negligence contributed in any way to the employee's injury, §3 of the Act, 45 U.S.C. §53. However, the plaintiff still has the burden of proving a hazardous condition, *Inman v. Baltimore & O. R.R.*, 361 U.S. 138 (1959), and that the employer, with the exercise of due care, could have reasonably foreseen that a particular condition could cause injury; foreseeability is "an essential ingredient" of negligence under the Act. *Gallik v. Baltimore & O. R.R.*, 372 U.S.

108, 117 (1963). But actual notice of an unsafe condition is unnecessary. Constructive notice may suffice. See *Security Ins. Co. v. Johnson*, 276 F.2d 182 (10th Cir. 1960) and cases cited at 187. In short, the principles that the employer is not an insurer of its employees' safety, and that negligence is not presumed merely by proving an injury, are still viable. Employer negligence is still mandatory for recovery under the Act.

The instant case concerns what is probably the most common conduct sought to be proved negligent in cases brought under the Act: the alleged failure of the employer to use reasonable care in furnishing his employees with a safe place to work. Although the railroad construes this case as involving different principles, it does not dispute the settled premise that under the Act, an employer has

> "the nondelegable duty to provide its employees with a safe place to work even when they are required to go onto premises of a third party over which the railroad has no control." Shenker v. Baltimore & O. R.R., 374 U.S. 1, 7 (1963).

This duty includes a duty to inspect the third party's property for hazards and to take precautions to protect the employee from possible defects. Although an employee may be on another's property for only a

[3]It might be noted that this burden is distinguishable from the less onerous proof required for recovery in actions based on violations of the Safety Appliance Act, 45 U.S.C. §§1-16. Although the cause of action for injuries created by §1 of the FELA embraces suits based on the Safety Appliance Act, it is settled that in those actions the employee is required to prove only a statutory violation, and need not prove negligence. See, e.g., Crane v. Cedar Rapids & I.C. Ry., 395 U.S. 164 (1969).

short time, and although the employer may have no supervision over the property, there is no de minimus rule. The "brevity of the sojourn" is irrelevant with respect to the duty to provide a safe place to work, even though the opportunity to discover defects is obviously seriously lessened. The employer may protect itself by simply refusing to permit its employees from going on the property. Id. at 10.

One rationale for the stringency of this rule is that if the employer were not held liable for injuries occurring on property not under his direct control or responsibility,

> "the railroads, by the simple expedient of doing each other's work, could tie their employees up in legal technicalities over the proper railroad to sue for injuries and perhaps remove from coverage of the Act a significant area of railroad activity." Id. at 11.[4]

The significance of the foregoing to this case is that even if Southern Pacific were to be considered an aloof third party, its negligence in designing the track roadbed prior to leasing it to the railroad, or its failure under the lease agreement to properly maintain the roadbed, may not absolve the railroad for its separate and distinct statutory duty to provide its employees with a safe place to work. This duty involves a wholly

[4] This policy reflects §5 of the Act, 45 U.S.C. §55, which provides that

> "any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void."

independent inquiry; the distinction is well illustrated by the following cas

In *Kennedy v. Pennsylvania R.R.*, 169 F. Supp. 406 (W.D. Pa. 1959), a jury held the railroad liable for damages to the plaintiff for injuries he sustained in a derailment, based upon its finding that the railroad was negligent in failing to provide the plaintiff with a safe place in which to work. The derailment occurred at a track crossing owned by United States Steel, against whom the railroad sought indemnity. The jury found that USS was responsible for maintaining the crossing, and that the crossing had become unsafe through the acts of USS without fault on the part of the railroad. However, that issue was treated separate and apart from the railroads failure in its nondelegable duty to provide the plaintiff with a safe place to work. The crossing having been found unsafe, the railroad was held liable to the plaintiff, On motion for new trial, that portion of the judgment was only lightly pursued. The third-party action was the primary source of contention, the court awarding indemnity to the railroad against USS on the basis of an unwritten agreement, and affirming the jury verdict in favor of the plaintiff.

On Appeal the Third Circuit reversed, holding the jury findings not fully determinative of the indemnity question. Although the plaintiff's judgment was not appealed by the railroad, the court drew the distinction between the main action being governed by the FELA.

and the third-party action being governed by state law. The court observed that in the absence of a specific agreement requiring the steel company to maintain the tracks, recovery over by the railroad might be barred under state law. It is implicit, however, tha regardless of whether there was an express agreement or not, the employee could recover from the railroad under the FELA; the railroad-USS squabble could in no way weaken that judgment. *Kennedy v. Pennsylvania R.R.*, 282 F.2d 705 (3rd Cir. 1960).

The *Kennedy* holding clearly demonstrates, with regard to the instant case, that the respective responsibilities between the railroad and Southern Pacific are irrelevant with regard to Nivens' cause of action. In this respect, as far as the maintenance element in the court's charge is concerned, Southern Pacific's failure to maintain the tracks would not defeat Nivens' claim against the railroad, even if the lease made Southern Pacific's duty absolute. The most that the railroad could claim is indemnity from Southern Pacific for failing to meet its contractual obligation. It is not surprising, of course, that in view of their corporate relationship a third-party action was not filed.

The railroad's attempt to hide behind another's negligent design fails for similar reasons. The third-party's negligence in no way lessens the railroad's duty to provide a safe place to work. The railroad's argument that it could not have known of the faulty design at its inception evades the issue; the date the roadbed

was designed is of no importance. The railroad had a positive duty to inspect and to discover defects from the date it permitted its employees to travel on the roadbed. Although the bulk of the evidence clearly proved that the design of the roadbed was faulty, the same evidence just as clearly proves that the railroad had constructive, if not actual, notice of the defect long before the accident. Its duty under the act to correct it, or to refuse to permit its employees from working upon it, is settled.

The court's charge imputing responsibility for design to the railroad was therefore unnecessary, but it is hardly questionable. Liability may be imposed on a railroad for a third-party's negligence while "engaged in furthering the operational activities" of the railroad. The third party's activities are considered a part of the railroad's "total enterprise". The rationale is arguably applicable to third-party negligence occurring before the railroad gains the benefit of the third party's activities. Cf. *Sinkler v. Missouri Pac. R.R.*, 356 U.S. 326, 331 (1958). But even if that portion of the charge erroneously imputed prior negligence of Southern Pacific to the railroad, the evidence overwhelmingly proved that the railroad was negligent in providing a safe place to work, and that element was charged. That Nivens' counsel pursued the more difficult theories of defective design and imputed negligence does not detract from the other proofs, which were properly charged. Any employer negligence, however small,

would be sufficient to award the plaintiff his verdict. Since there was abundant evidence from which the jury could have concluded that the railroad knew or should have known of the defect; that it failed to correct it; and that it therefore permitted Nivens to work in an unsafe place, the verdict should stand.

> "Only when there is a complete absence of probative facts to support the conclusion reached [by the jury] does a reversible error appear." Lavender v. Kurn, 327 U.S. 645, 653 (1946); cf. Dennis v. Denver & R.G. R.R., 375 U.S. 208 (1963).

II

It is next contended that the court erred in instructing the jury that if the railroad was negligent in permitting its train to run under the circumstances, and even if the rainstorm were found to be an act of God, verdict should be for the plaintiff. The railroad maintains that the charge does not rest on evidence that it had even constructive notice of the storm conditions, thus it could not know that it should stop running its train, or foresee that the track would wash out.

We pretermit any extended discussion on this point, since the evidence clearly showed that the railroad had legally sufficient notice that the roadbed was unsafe and might wash out. In light of this knowledge, its conduct in permitting its trains to run long before the accident, and even in dry weather, was negligent under the Act.

Whether the storm on the date of the accident was unprecedented, and whether the railroad knew of the storm or could have foreseen that a washout might occur that night, are therefore irrelevant. The point is that the train ran upon a track that was unsafe, and that the railroad permitted the unsafe condition to exist.

III

The railroad's last contention is that the court erred in admitting, over objection, hearsay testimony of one S. H. Pippin concerning knowledge of the defective roadbed. The railroad maintains that this testimony imputed notice by Southern Pacific of the defect to the railroad, even though Pippin's communications to Southern Pacific took place 10 years before the railroad began using the track. Pippin's testimony related to washouts which occurred or almost occurred at the point of the accident in 1920, 1942, and 1947, including his recommendation to Southern Pacific officials that a large trestle be built to replace the small culvert. Mr. Pippin testified that he had never talked with a representative of the railroad as to what he thought about the adequacy of the drainage structure.

The appellee contends that his case is as well off without Pippin's testimony as it is with it; Pippins testimony was merely cumulative to evidence offered by the railroad. The railroad offered exhibits containing correspondence between Southern Pacific agents which reflect that the agents had considered, but had

decided against, replacing the culvert with a trestle. Evidence as to the earlier washouts was admitted without objection from the railroad.

We find the appellee's position to be meritorious, and conclude that the admission of Pippin's testimony was not error.

The evidence offered by the railroad pertaining to the suggestions to build a stronger crossing would warrant the jury's conclusion that the railroad had constructive notice. More importantly, however, the evidence that the crossing had washed out in the past was sufficient for the jury to conclude that the railroad had actual notice that the culvert was inadequate, and that the crossing was therefore unsafe. Since the jury may use any evidence it wishes to arrive at its verdict, whether knowledge was imputed to the railroad need not be reached. Moreover, a railroad has the duty to inspect for defects. With only a little inspection of Southern Pacific's files, it would have had actual knowledge of the danger. With the information there, the jury could conclude that the railroad failed in its duty to inspect, resulting in the injury.

In sum, we conclude that there was sufficient evidence of negligence to justify submission to the jury, and that there was no reversible error in the charge. Accordingly, the case is

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

For The Fifth Circuit

October Term, 1968

No. 28251

D. C. Docket No. CA 1219

DON NIVENS,
Plaintiff-Appellee,

v.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Texas

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Before WISDOM, GOLDBERG and INGRAHAM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment

of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

April 16, 1970

Issued as Mandate: May 28, 1970

APPENDIX C

In the
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 28251

DON NIVENS,
Plaintiff-Appellee,

versus

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Texas

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ON PETITION FOR REHEARING

Before WISDOM, GOLDBERG, and INGRAHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

CERTIFICATE OF SERVICE

It is hereby certified that three copies of the foregoing Petition for Certiorari have been served upon counsel for respondent by placing the same in the United States Post Office, with first class postage prepaid, properly addressed to counsel of record, Mr. Franklin Jones, Jr., Post Office Drawer 1249, Marshall, Texas, on this the 8th day of August, 1970.

Jack W. Flock

JACK W. FLOCK